

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

JEFFREY SMITH, et al.,

Case No. 1:10-cv-718

Plaintiffs,

Diott, J.  
Bowman, M.J.

v.

INDIAN HILL EXEMPTED VILLAGE  
SCHOOL DISTRICT, et al.,

Defendants.

**REPORT AND RECOMMENDATION**

On October 15, 2010, Plaintiff Jeffrey Smith initiated this litigation *pro se* on behalf of himself and his daughter ("JMS"). On May 5, 2011, I filed a Report and Recommendation that recommended that all of the Defendants' motions to dismiss be granted, that several motions filed by Plaintiff be denied, and that the entirety of Plaintiffs' complaint be dismissed with prejudice. (Doc. 31). In that R&R, I recommended the denial of the School District Defendants' request for fees. However, I described the issue as "close" and forewarned Plaintiff that if he "continued to engage in a pattern of conduct that suggested abuse of the litigation process, sanctions may well be warranted." (*Id.* at 17-18).

Plaintiffs filed objections, as well as four additional motions. On September 16, 2011, the presiding district judge denied Plaintiffs' motions, overruled Plaintiffs' objections, mostly adopted the Report and Recommendation, and dismissed Plaintiffs' complaint with

prejudice. The one issue on which Chief Judge Susan J. Dlott disagreed with the R&R involved the School District's request for attorney's fees. Because the Court determined that Plaintiffs' frivolous motion practice had demonstrated "continued harassment of the defendants," and finding that "only an award of sanctions will deter these harassing frivolous motions," (Doc. 50 at 2), the Court granted the School District Defendants' request for an award of fees. (*Id.* at 3). In response to the Court's order, the School District filed a formal motion for attorney's fees (Doc. 53), setting forth the basis for an award of fees and costs. On October 31, 2011, the School District Defendants filed a supplemental memorandum setting forth the basis for an award in the amount of \$34,136.00. (Doc. 63).

Plaintiffs have filed no document that responds directly to Defendants' motion for fees, but Plaintiff Jeffrey Smith has filed a 94 page Notice of Appeal that appears to challenge nearly all rulings of this Court. (Doc. 66). His appeal remains pending before the Sixth Circuit Court of Appeals.

Although a district court retains jurisdiction to rule on a pending motion for attorney's fees even when an appeal is pending in the Sixth Circuit, issues of judicial economy counsel against ruling on the School District Defendants' motion for fees at this time. If the Sixth Circuit were to reverse this Court, the basis for the award of fees would require re-examination. By contrast, if the Sixth Circuit were to affirm, it is possible that Defendants would seek an additional fee award. Based upon these reasons of judicial efficiency, I recommend that Defendants' motion for attorney's fees be denied at this time, without prejudice to renew upon the conclusion of the pending appeal. In the alternative, I would recommend that the Court grant the well-supported and largely unopposed pending motion for attorney's fees, in the amount of \$34,136.00, but stay collection of that award unless

and/or until the Sixth Circuit affirms the prior judgment on appeal.

### **III. Conclusion and Recommendation**

Accordingly, for the reasons explained above, **IT IS RECOMMENDED THAT** the Defendants' motion for attorney's fees (Doc. 53) be **DENIED**, but without prejudice to renew following conclusion of the pending appeal before the Sixth Circuit Court of Appeals.

*In the alternative*, **IT IS RECOMMENDED THAT** the Court grant the Defendants' motion for attorney's fees in the amount of \$34,136.00, but stay collection of that award unless and/or until the Sixth Circuit affirms the prior judgment on appeal.

s/ Stephanie K. Bowman

Stephanie K. Bowman  
United States Magistrate Judge

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Defendants.

**NOTICE**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report and Recommendation (“R&R”) within **FOURTEEN (14) DAYS** of the filing date of this R&R. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within **FOURTEEN (14) DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. See *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).